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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/831,272	08/13/2001	Christoph Kirsch	4038.001	3234
41288	7590	12/15/2009		
PATENT CENTRAL LLC Stephan A. Pendorf 1401 Hollywood Boulevard Hollywood, FL 33020			EXAMINER MARVICH, MARIA	
			ART UNIT	PAPER NUMBER
			1633	
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			12/15/2009 PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 09/831,272	Applicant(s) KIRSCH ET AL.
Examiner MARIA B. MARVICH	Art Unit 1633

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 December 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☒ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☒ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: 3, 22, 42, 43 and 49.
 Claim(s) objected to: _____.
 Claim(s) rejected: 2, 8, 9, 39 and 44-47.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: applicants' arguments are moot in view of the non-entry of the claims. It is noted that had applicants' claims been entered, the rejection of claims 2, 8, 9, and 47 would have been overcome. Claim 39 suffers from issues indicated above.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
 13. ☒ Other: See Continuation Sheet.

/Maria B Marvich/
Primary Examiner, Art Unit 1633

Continuation of 3. NOTE:

Claim 39 has been amended in such a way that issues under 35 USC 112 second paragraph and new matter have arisen. Specifically, the claim recites that the promoter is produced by inserting at least one cis element into a promoter wherein the promoter 1) comprises at least one cis element of several that induces local gene expression 10-15 fold, or 2) comprises at least one cis element of several that induces local gene expression 15-80 fold or 3) the at least one cis element is selected from a number of combination of disclosed cis elements AND 4) the promoter comprises a minimal promoter and one of two sets of combinations of cis-elements. As regards 112 second paragraph, there are two sets of promoters, the endogenous one that is rendered responsive to pathogens and the one that is produced by the method. The two should be distinguished as, for example, a chimeric promoter or a chimeric expression sequence produced by inserting at least one cis element into a promoter and thereafter referring to the chimeric promoter or the promoter. Secondly, the method only requires insertion of at least one cis element, however, item 4) requires that a minimal promoter be part of the end sequence. This cannot be without its insertion as part of the method.

As regards issues of New Matter, by reciting that the chimeric promoter is 1) 2) or 3) and 4), the claimed promoter comprises a number of combined elements that are not so disclosed as used together. For example, by combining item 1 and 4, the insertion is for example, 4 copies of SEQ ID 11, 4 copies of SEQ ID 4, two or more cis elements wherein one consists of SEQ ID NO:11, a minimal promoter and one of SEQ ID NO:s 5, 6, 8-10, 12 and 13. This results in a number of combinations that are not encompassed by the specification. Secondly, the method as amended recites that the cis elements are inserted into the promoter and furthermore comprise a minimal promoter. This duplication of promoter elements is not so described in the specification.

Additionally, newly added claims 50-52 have not been subject to examination. Furthermore, claims 51 and 39 introduce sequences that have not been examined regarding description and 112 second issues.

Continuation of 13. Other: Claims 44-46 are objected to as a multiply dependent claim cannot depend from another multiply dependent claim. In this case, these claims are multiply dependent claims that depend from another multiply dependent claim by depending from claims 8 and 9. As well, claim 46 recites "comprises comprising".